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IN THE
COURT OF APPEALS OF INDIANA

DAVID ASHER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0712-CR-667
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark Stoner, Judge
Cause No. 49G06-0705-FB-085194

June 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

David Asher appeals his sentence for robbery as a class C felony[1] and an habitual offender enhancement.[2] Asher raises one issue, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing Asher; and

II. Whether Asher's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On May 14, 2007, K.Y. was riding his bicycle when Asher approached him and put something hard into K.Y.'s rib area, told K.Y that he had a gun, and ordered K.Y. to give him everything. K.Y. gave Asher his cell phone, an "MP3" player, and his bicycle. Appellant's Appendix at 13. K.Y. ran home and notified his father that he had been robbed. K.Y.'s father dialed the number of the stolen cell phone, spoke to Asher, and offered to buy the phone from Asher. Asher agreed to meet K.Y.'s father in a parking lot. K.Y.'s parents called the police. Asher was arrested at the meeting place a short time later and had K.Y.'s cell phone on him at the time. Asher told the police where K.Y.'s bicycle and "MP3" player were located, but the police could not find them.

The State charged Asher with robbery as a class B felony.[3] The State also alleged that Asher was an habitual offender. The State later added a charge of robbery as a class

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[1] Ind. Code § 35-42-5-1 (2004).

[2] Ind. Code § 35-50-2-8 (Supp. 2005).

[3] Ind. Code § 35-42-5-1 (2004).

C felony. Asher pleaded guilty to robbery as a class C felony and to being an habitual offender. In exchange, the State agreed to forego prosecution on the charge of robbery as a class B felony. The plea agreement stated that the executed sentence would be capped at eight years.

The trial court found the fact that Asher had taken responsibility for his behavior by his plea of guilty and his alcohol and drug issues as mitigating circumstances. Specifically, the trial court noted that his alcohol and drug issues were "[s]omewhat of a mitigator," but "not a significant mitigator since [Asher] has had ample opportunity through his prior treatment in the criminal justice system to address these issues and has never done it." Transcript at 31. The trial court found Asher's "substantial" criminal history as an aggravator and noted that Asher had previously had his probation revoked and was on probation at the time of the present offense. Id. The trial court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Asher to six years for robbery as a class C felony, enhanced the sentence by six years because of his habitual offender status, and suspended four years. Thus, the trial court sentenced Asher to a term of twelve years with eight years executed at the Indiana Department of Correction.

I.

The first issue is whether the trial court abused its discretion in sentencing Asher. We note that Asher's offense was committed after the April 25, 2005, revisions of the

sentencing scheme.[4] In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonably detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (Ind. 2007). We review the sentence for an abuse of discretion. Id. An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Id.

A trial court abuses its discretion if it: (1) fails "to enter a sentencing statement at all;" (2) enters "a sentencing statement that explains reasons for imposing a sentence – including a finding of aggravating and mitigating factors if any – but the record does not support the reasons;" (3) enters a sentencing statement that "omits reasons that are clearly supported by the record and advanced for consideration;" or (4) considers reasons that "are improper as a matter of law." Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing "if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record." Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those that should have been found, is not subject to review for abuse of discretion. Id.

[4] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code § 35-50-2-7 (Supp. 2005).

Asher appears to argue that the trial court gave his criminal history too much weight because "[h]is adult felony offenses were included in the Habitual Offender charge, which by agreement was to be consecutive to the C felony." Appellant's Brief at 10. Asher essentially argues that the trial court failed to give the aggravator proper weight. Pursuant to Anglemyer, the relative weight or value assignable to reasons properly found is not subject to our review for abuse of discretion. Consequently, we cannot review Asher's argument. See, e.g., Anglemyer, 868 N.E.2d at 491.

Asher also argues that the trial court omitted his remorse as a mitigating factor.[5] "The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001), reh'g denied. However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find

[5] Asher also argues that the trial court "did not mention . . . the victim's father's agreement to a sentence allowing for treatment of his drug addiction." Appellant's Brief at 11. The trial court did not find the statements of K.Y.'s father as a mitigator. To the extent that Asher is attempting to argue that the trial court overlooked this proposed mitigator, Asher does not cite to the record or develop this argument. Thus, Asher has waived this argument. See Ind. App. R. 46(A)(8)(a); see also Jackson v. State, 735 N.E.2d 1146, 1154 (Ind. 2000) (holding that the defendant waived his argument by failing to cite to authority or develop the argument).

mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

A trial court's determination of a defendant's remorse is similar to a determination of credibility. Pickens v. State, 767 N.E.2d 530, 534-535 (Ind. 2002). Without evidence of some impermissible consideration by the court, we accept its determination of credibility. Id. The trial court is in the best position to judge the sincerity of a defendant's remorseful statements. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied.

Asher does not allege any impermissible considerations. Rather, Asher points to his letter in the presentence investigation report, which states:

> I am asking for help! I've been to prison off and on, I will take full responsibility, I really need some kind of treatment, I never been [sic] to work-release or anything like that, or a hospital for my addiction, I pray that there's something out there for me, to get help. I know I have a problem and the first step is to amitt [sic] it. If I can control my addiction I know I'll stop getting in trouble. Drugs is [sic] the reason why I get into situation like this. I've been smoking crack since I been 13. I know if I don't change I'll be dead or in here forever. I'm not trying to make excuses, what I do is wrong. But I know its really not me its [sic] the Beast inside of me chasing dope. Please consider my honesty. I want to change so bad. I'll give it everything I got. A little help from you is what I need. My daughter needs me, not the drug addict I've been for so long.

Presentence Investigation Report at 11.

Asher's letter emphasizes his issues with drugs. The trial court found Asher's alcohol and drug issues as "[s]omewhat of a mitigator," but noted that such issues were "not a significant mitigator since [Asher] has had ample opportunity through his prior treatment in the criminal justice system to address these issues and has never done it." Transcript at 31. We cannot say that Asher's remorse is both significant and clearly supported by the record. Thus, the trial court did not abuse its discretion by not finding Asher's alleged remorse to be a mitigating circumstance. See, e.g., Stout, 834 N.E.2d at 711 (addressing the defendant's argument that the trial court had overlooked his remorse as a mitigating factor and holding that the trial court did not err by refusing to find the defendant's alleged remorse to be a mitigating factor).

II.

The next issue is whether Asher's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Asher argues that his executed time should be

reduced "to six years, with a commitment to work release in Community Corrections for the last two years." Appellant's Brief at 12.

Our review of the nature of the offense reveals that Asher approached K.Y., put something hard into K.Y.'s rib area, told K.Y that he had a gun, and ordered K.Y. to give him everything. K.Y. gave Asher his cell phone, an "MP3" player, and his bicycle. Appellant's Appendix at 13. Asher then agreed to meet K.Y.'s father in a parking lot so that K.Y.'s father could buy the phone.

Our review of the character of the offender reveals that Asher pleaded guilty. Asher has an extensive criminal history, which includes juvenile adjudications for criminal trespass as a class A misdemeanor, burglary as a class C felony, fleeing law enforcement as a class B misdemeanor, and burglary as a class B felony. As an adult, Asher has been convicted of being a minor in a tavern as a class C misdemeanor, possession of alcohol by a minor as a class C misdemeanor, public intoxication as a class B misdemeanor, theft as a misdemeanor, two counts of resisting law enforcement as class A misdemeanors, burglary as a class B felony, two counts of theft as class D felonies, and public indecency as a class A misdemeanor. Asher was on probation at the time of the current offense.

The presentence investigation report addresses Asher's past substance abuse treatment and states:

> Mr. Asher reported participation in substance abuse treatment during his stay in the Indiana Department of Correction. He denied ever having been Court ordered to complete substance abuse treatment through the Marion

> County Probation Department; however, this Officer found he was Court ordered to undergo an evaluation and complete any treatment recommended on two occasions. Under cause number 49F19-9808-CM-131926 the defendant did not complete treatment prior to his probation being revoked, and under cause number 49G02-0009-CF-161628 a Notice of Probation Violation was filed alleging the defendant failed to comply with treatment.

Presentence Investigation Report at 17.

Given Asher's extensive criminal history and after due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Patterson v. State, 846 N.E.2d 723, 731 (Ind. Ct. App. 2006) (holding that the defendant's sentence for robbery was not inappropriate).

For the foregoing reasons, we affirm Asher's sentence for robbery as a class C felony and the enhancement due to his status as an habitual offender.

Affirmed.

NAJAM, J. and DARDEN, J. concur